

**United States Department of Labor
Employees' Compensation Appeals Board**

V.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Margate, FL, Employer**

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**Docket No. 20-1544
Issued: April 7, 2021**

Appearances:

*Joanne M. Wright, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 24, 2020 appellant, through counsel, filed a timely appeal from a March 4, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 12, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the March 4, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 14, 1995 appellant, then a 36-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed an emotional condition due to being harassed by her supervisor. She noted that she first became aware of her emotional condition and realized its relation to factors of her federal employment on June 16, 1998. Appellant stopped work on June 16, 1998 and returned to full duty on September 12, 1998. OWCP accepted her claim for post-traumatic stress disorder (PTSD). Appellant stopped work again on June 3, 2000. OWCP paid her wage-loss compensation on the periodic rolls, effective October 6, 2002.

On March 2, 2015 appellant returned to work in the private sector as a caretaker in a group home. By decision dated May 26, 2015, OWCP found that the actual wages of the caretaker position fairly and reasonably represented her wage-earning capacity. It noted that, because appellant's earnings met or exceeded the current wages of the job held when injured, her wage-loss compensation benefits had been terminated. OWCP indicated that the decision did not affect coverage of her ongoing medical benefits.

On January 29, 2016 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work commencing January 11, 2016.⁴ She alleged that after returning to work in March 2015 she had difficulty sleeping, getting along with her family, and keeping up with personal care. Appellant described that on January 11, 2016 she had a panic attack and stopped work.

In a March 22, 2016 development letter, OWCP informed appellant that, in order to be entitled to compensation, her recurrence of disability claim must be treated as a claim for modification of the previously established May 26, 2015 loss of wage-earning capacity (LWEC) determination. It advised her of the three criteria necessary for modifying such decisions and of the evidence necessary to establish her claim. OWCP afforded appellant 30 days to provide evidence substantiating that she had met any of the criteria.

Appellant submitted letters dated April 7 and 28, 2016 by Dr. Robert Perovich, a Board-certified psychiatrist, who indicated that he had treated her since November 20, 2001 for PTSD resulting from a supervisor that was verbally abusive towards her at work. Dr. Perovich reported that her accepted injury was still present and that she was disabled from work. He recounted that appellant had made a recent attempt to go back to work, but due to her psychiatric difficulties, she was advised to stop work on January 11, 2016.

In an April 12, 2016 letter, Dr. Craig Fabrikant, a psychologist, recounted that appellant was seen for weekly psychotherapy sessions since November 2015 for treatment of PTSD that resulted from a supervisor who verbally abused her at work. He indicated that, since then, she had

⁴ The claim form indicated that the date of recurrence as "9-00-2015" and the date that appellant stopped work as January 11, 2016.

suffered from symptoms of depression and anxiety. Dr. Fabrikant opined that these symptoms had interfered with appellant's ability to work and made it impossible for her to maintain any type of regular employment.

By decision on May 2, 2016, OWCP denied modification of its May 26, 2015 LWEC determination, noting that the evidence submitted was insufficient to establish any of the three criteria necessary to warrant modification of a formal LWEC decision.

On May 30, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on January 24, 2017. Appellant clarified that there was no specific incident that occurred on January 11, 2016, but that she had been having problems maintaining her current job due to her work-related PTSD injury.

In a May 23, 2016 letter, Dr. Fabrikant indicated that he had recommended that appellant leave her job in January 2016 due to her level of stress. He recounted that on January 11, 2016 she experienced a major panic attack at work, which significantly increased her levels of stress and anxiety. Dr. Fabrikant further explained that during the summer 2015 appellant's stress and anxiety levels got to the point where she had to take a lot of time off work. He recommended that she remain out of work indefinitely.

Appellant submitted additional letters dated May 27, 2016 through February 21, 2017 by Dr. Perovich who described her PTSD diagnosis and work-related injury. Dr. Perovich reported that, since working at a group home, she had to take periodic days off work due to overwhelming anxiety and panic attacks that stemmed from her work-related injury. He explained that appellant was advised to stop work on January 11, 2016 due to her anxiety and panic attacks that had escalated over the months and were similar to her previous PTSD symptoms.

By decision dated February 28, 2017, OWCP's hearing representative affirmed the May 2, 2016 decision.

On December 27, 2017 appellant, through her then-representative, requested reconsideration and submitted additional medical evidence.

OWCP received letters dated October 9 and November 8, 2017, by Dr. Perovich who reiterated that appellant had to stop working on January 11, 2016 due to escalating anxiety and panic attacks that stemmed from her work-related PTSD injury. Dr. Perovich also indicated that he had reviewed previous reports dated from 2013 through 2015 and noted that they described essentially the same symptoms that he had observed.⁵

By decision on July 5, 2018, OWCP denied modification of its May 26, 2015 LWEC determination.

On March 27, 2019 appellant requested reconsideration and submitted additional evidence, including a September 11, 2018 letter by Dr. Perovich.

⁵ Appellant also submitted psychological treatment notes previously of record dated September 16, 2013, September 15, 2014, and January 9, 2015.

In a January 17, 2019 letter, Dr. Perovich cited to 20 C.F.R. § 10.511 regarding the evidence required to modify a formal LWEC determination. He explained that the additional details supporting the worsening of appellant's PTSD included, but may not be limited to panic attacks, flashbacks of prior stressors and stress triggers, exacerbation of stress and anxiety levels to postdiagnostic levels, and medical symptoms. Dr. Perovich concluded that she was unable to work because of the persistent PTSD with associated severe panic anxiety, depression, and flashbacks, which gravely impacted her ability to function daily and required ongoing treatment and medication.

By decision dated June 12, 2019, OWCP denied modification of its May 26, 2015 LWEC determination. It noted that the medical evidence submitted was insufficient to explain what type of exacerbation occurred that caused a worsening of her work-related PTSD condition and inability to work.

On December 23, 2019 appellant requested reconsideration.

Appellant submitted a September 24, 2019 letter by Dr. Perovich, where he reported that in June 2013 she returned to part-time work at a group home, but was only able to sporadically maintain this employment until January 11, 2016. Dr. Perovich explained that, due to her overwhelming anxiety stemming from her federal employment, she was advised to completely stop work. He indicated that appellant's anxiety and panic attacks had escalated over the previous months and the symptoms of PTSD had continued to worsen to the extent that she was reliving the PTSD that occurred in 1998.

In a November 11, 2019 letter, Dr. Perovich recounted appellant's history of injury and opined that her PTSD was never cured and continued to have a debilitating impact in her life. He indicated that in June 2013 she began to work at a private group home, but that she was often late, absent, and required frequent breaks because of the overwhelming anxiety stemming from the recurrence of her disability from the trauma of her federal employment. Dr. Perovich reported that the "specific situation" that occurred, which impacted appellant's ability to continue working, was the ongoing PTSD symptoms and recurrence of her disability from working at the employing establishment. He explained that because of the ongoing recurrence of PTSD symptoms, which led to appellant current disability, she stopped work at the group home and is not able to work permanently.

By decision dated March 4, 2020, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁷

⁶ *Supra* note 2.

⁷ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹¹

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

Along with her reconsideration request, appellant submitted Dr. Perovich's November 11, 2019 letter, in which he specifically responded to the deficiencies noted by OWCP in its recent denial of her recurrence of disability claim. In his letter, Dr. Perovich indicated that after she began to work at a private group home in June 2013, she was often late, absent, and required frequent breaks due to the overwhelming anxiety stemming from the recurrence of her disability from the trauma of her federal employment. He reported that the "specific situation" that occurred, which impacted appellant's ability to continue working was the ongoing PTSD symptoms and recurrence of her disability from working at the employing establishment. Dr. Perovich specifically addressed the type of exacerbation that she had experienced, which OWCP had found lacking in its previous decisions. He also further explained how appellant's worsening PTSD condition had impacted her daily life and ability to work. Thus, the Board finds that Dr. Perovich's November 11, 2019 report specifically addressed the deficiencies noted in OWCP's denial of its modification of her May 26, 2016 LWEC determination and provided further explanation to cure those deficiencies.¹² As such, Dr. Perovich report constitutes relevant and pertinent new evidence in support of appellant's claim for wage-loss compensation beginning January 11, 2016.

⁸ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹⁰ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹² *See L.M.*, Docket No. 20-1185 (issued January 13, 2021).

Therefore, the submission of this evidence requires reopening of her claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b).¹³

The Board will therefore set aside OWCP's March 4, 2020 decision and remand the case for an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 7, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹³ See *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *D.M.*, Docket No. 10-1844 (issued May 10, 2011).